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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BRYAN ALEXIS GONZALEZ,

Defendant and Appellant.

G055245

(Super. Ct. No. 14WF1826)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kim Menninger, Judge. Judgment affirmed in part, reversed in part, and remanded.

Victoria H. Stafford, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, A. Natasha

Cortina, Seth Friedman and Adrian R. Contreras, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Bryan Alexis Gonzalez of two counts of second degree robbery (Pen. Code, §§ 211/212.5, subd. (c);[1] active participation in a criminal street gang (§ 186.22, subd. (a)); felon in possession of a firearm (§ 29800, subd. (a)(1)); second degree commercial burglary (§§ 459-460, subd. (b)); receiving stolen property (§ 496, subd. (a)); two counts of aggravated kidnapping (§ 209, subd. (b)); and dissuading a witness from reporting a crime (§ 136.1, subd. (b)(1)). The jury also found true the enhancement allegations on several counts alleging defendant committed the crimes for the benefit of a criminal street gang (§ 186, subd. (b)(1) & (4)) and that he personally used a firearm in committing those offenses. (§§ 1192.7, 667.5, 12022.53, subd. (b).) In a bifurcated proceeding, the trial court found true a prior strike allegation that Gonzalez was previously convicted of a serious and violent felony. The court sentenced him to a term of 45 years to life.

On appeal, Gonzalez raises 11 issues, ranging from challenges to the sufficiency of the evidence to support his kidnapping and burglary convictions and the gang enhancement, to the alleged inadequacy of the court's response to a jury question regarding gang "association," and to sentencing challenges under section 654, the trial court's decision not to strike the prior strike, and the court's initial statement at sentencing applying the gang enhancement to a count not alleged by the prosecution, which the court sua sponte corrected. None of these claims have merit. The Attorney General concedes, and we agree that reversal and remand is necessary on several discrete sentencing issues and for correction of the court's minutes and a new abstract of judgment. We affirm the judgment in all other respects.

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[1] All further statutory references are to this code, unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

One evening in May 2014, between 10:00 and 11:00 p.m., a man and his fiancée were walking to their car parked near the Huntington Beach pier, when they saw three men in or near a Jeep, including one in the back seat cleaning a revolver. The man outside the Jeep asked them for change for the parking meter, which the couple explained they did not have. As the man with the gun exited the Jeep, he put the gun in his waistband area; he appeared to be his early 20's and wore a black shirt and black pants. The couple got in their car, drove away, and reported their observations to the police.

Around 10:30 p.m. that night, Tosha S. and her date drove to Huntington Beach, parked on Pacific Coast Highway, and walked to a fire pit on the beach where they sat down alone. Within about 15 minutes, a man Tosha later positively identified to police as defendant, approached the couple. He stood over them, drew a gun, and said, "Give me everything you got." Frightened, they complied, handing the man their cell phones, a Bluetooth radio, and some marijuana. When Gonzalez demanded money, which Tosha said she had in her car, he instructed them to leave their shoes behind as he walked them to the car. He warned, "If you try anything, I'm going to kill you."

Gonzalez remained about a foot behind the couple as they walked. He threatened that "if [they] tr[ied] anything funny," he would shoot. They crossed a sandy stretch of beach from the fire pit, climbed over a short wall, and then traversed the parking lot to their car parked next to the sidewalk along Pacific Coast Highway (PCH). The distance was roughly 100 yards.

Tosha opened her car door and gave Gonzalez seven dollars from her car visor. When he asked, "That's it?," she responded that it was all she had. Four girls walked by on the sidewalk, and Tosha tried to get their attention by stating loudly that she had no more money, but the girls did not stop, and Tosha feared she would be shot if she yelled out that she was being robbed.

Gonzalez directed Tosha's date to open the car trunk; when he did, Gonzalez grabbed a new cell phone still in its box. Tosha was seated in the car and when she started it, Gonzalez threatened to kill them if they called the police.

After Tosha's date got into the car, the couple drove to Main Street and found a police officer. Tosha told the officer about the incident and gave him defendant's description. Other officers in the area were then notified about the robbery.

Around 10:36 p.m., the first couple's report regarding the man cleaning a gun in the Jeep was also broadcast to officers in the area, and the man who made that report accompanied officers to show them where the Jeep was parked.

At about the same time, a worker at a nearby bicycle rental kiosk was moving his bicycles from a street kiosk to load them into a truck. The kiosk was near the same intersection where Tosha's car had been parked. As the worker organized his bicycles, he returned to the kiosk to retrieve a pink bicycle and saw that it was missing. The bicycle had the kiosk's name on the front.

An officer consulting with other officers about the reports of the man cleaning a gun and the robbery near the fire pits later spotted Gonzalez riding through a beach parking lot on a pink bicycle. The officer aimed his flashlight at defendant and called out "Police, stop." Gonzalez did not stop. Instead, he pedaled away toward Beach Boulevard, with the officer in pursuit on foot.

As Gonzalez approached the parking lot exit, he was unable to maneuver the bicycle under the exit gate and fell off. He ignored the officer's order to stay on the ground. Instead, he stood up and began running. When he stood, a handgun fell to the ground. He abandoned the bicycle between 100 and 200 yards from the rental kiosk. The officer chased Gonzalez and ultimately he was detained. Officers found four cell phones on his person. The gun that fell from his waist was later determined to be a working revolver; it was unloaded when the officers recovered it.

Meanwhile, back at the Jeep, two men got in and drove away. Just after 11:00 p.m., officers pulled the Jeep over. Inside they found a cartridge casing that later proved to be consistent with having been fired by the revolver dropped by Gonzalez.

Everado Baiza was the driver of the Jeep, and Edgar Lopez Gomez was the passenger. Both men, like defendant, were admitted members of the 17th Street gang who had been stopped in the past along with defendant by Garden Grove police officers investigating the gang's activities.[2] Defendant's moniker in the gang was "Whispers." Expert testimony at trial indicated the gang's primary activities included unlawful firearm possession and vandalism.

Officers took Tosha to where they had detained defendant. She identified him and the gun he used in the robbery. Just outside the bicycle rental kiosk, an officer found a cell phone case that belonged to Tosha.

When told at the jail that he was being booked for robbery, defendant said, "I didn't rob that bitch. I was just asking aggressively." Another officer transported Lopez to the same jail. As the officer walked Lopez past the defendant's cell, Gonzalez said, "Damn bro. We got to go through this shit again." Addressing defendant as Whispers, Lopez told him to shut up.

On Tosha's cross-examination, defense counsel elicited that defendant stated at the fire pit that he was "sorry" and claimed he "had to feed his family." Tosha testified she feared defendant would carry out his threats to shoot her.

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[2] Before trial, codefendants Baiza and Lopez each pleaded guilty to violating section 29815, subdivision (a) (violating probation condition prohibiting possession of firearms), admitted as true the gang enhancement, and were sentenced to seven years in state prison.

DISCUSSION

1. *Sufficiency of the Evidence*

Gonzalez challenges the sufficiency of the evidence to support his conviction on counts 9 and 10 for aggravated kidnapping and on count 7 for burglary. He similarly challenges the jury's true finding on the gang enhancement.

Our review of such challenges is limited to determining whether substantial evidence supports the jury's verdict. Substantial evidence consists of evidence that is reasonable, credible, and of solid value. (*People v. Elliot* (2005) 37 Cal.4th 453, 466.) We must view the evidence in the light most favorable to the judgment. (*Ibid.*) We therefore make all reasonable inferences in support of the judgment. (*People v. Crittenden* (1994) 9 Cal.4th 83, 139 (*Crittenden*).) It is the trier of fact's exclusive province to assess witness credibility and to weigh and resolve conflicts in the evidence. (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330 (*Sanchez*).)

Under this standard of review, the test is whether substantial evidence supports the conclusion of the trier of fact, not whether we are persuaded the defendant is guilty beyond a reasonable doubt. (*Crittenden*, *supra*, 9 Cal.4th at p. 139; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) Consequently, a defendant attacking the sufficiency of the evidence "bears an enormous burden." (*Sanchez*, supra, 113 Cal.App.4th at p. 330.) The same standard of review applies both to convictions and to enhancements. (*People v. Wilson* (2008) 44 Cal.4th 758, 806.)

A. *Aggravated Kidnapping*

Gonzalez contends the evidence does not support the asportation element of his conviction for aggravated kidnapping because his movement of Tosha and her date from the fire pit to the parking lot was incidental to committing robbery. He argues that moving them roughly 100 yards did not substantially increase their risk of harm; instead,

he suggests this movement "actually decreased" their risk by moving them into a public parking lot that was well lit and closer to a busy road and other people. We disagree.

Nothing "limits the asportation element solely to actual distance" (*People v. Martinez* (1999) 20 Cal.4th 225, 236); "'the "scope and nature" of the movement . . . , and any increased risk of harm'" are also relevant. (*People v. Bell* (2009) 179 Cal.App.4th 428, 436.) The jury's analysis may include "such factors as whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, [or] increased both the danger inherent in a victim's foreseeable attempts to escape and the attacker's enhanced opportunity to commit additional crimes. [Fn. omitted.]" (*Martinez*, at p. 237.) Kidnapping for robbery, like kidnapping for ransom or to commit rape, is a form of aggravated kidnapping (§ 209, subd. (b)(1)), and therefore the movement of the victim must be "beyond that merely incidental to the commission of . . . the intended underlying offense," and must "increase[] the risk of harm to the victim over and above" the harm inherent in robbery. (*Id.*, subd. (b)(2).)

Robbery often involves incidental movement of the victim or victims to locate and take property. (*People v. Diaz* (2000) 78 Cal.App.4th 243, 248; *People v. Salazar* (1995) 33 Cal.App.4th 341, 347-348, fn. 8.) For example, directing a robbery victim to move around a house or business in which the robbery is occurring may be incidental to the robbery. (See, e.g., *People v. Mutch* (1971) 4 Cal.3d 389, 397-399; *People v. Daniels* (1969) 71 Cal.2d 1119, 1122-1125.)

Here, however, the jury could reasonably conclude the robbery was completed at the fire pit when Gonzalez seized the victims' property there. He then introduced new and greater risks of harm to each by moving them at gunpoint over a substantial distance to a new area. During this process, he increased the risk of harm to both victims not only by prolonging the encounter, but also by increasing the risk of injury inherent in a foreseeable escape attempt by either. They covered a significant

distance in moving from the fire pit, over a barrier, through the parking lot, and on to PCH. The inherent danger in such movement—and the increased likelihood they would try to escape—was tangible as Gonzalez ordered his victims to leave their shoes behind, adding that if they attempted to "try anything, I'm going to kill you."

Danger lurked at every moment during this lengthy movement for these vulnerable victims. Under the governing standard of review, we are in no position to second guess the jury's verdict given the abundance of evidence on this issue.

B. *Burglary*

Gonzalez contends no evidence other than his possession of the pink rental bike supported his conviction for burglary of the bicycle rental kiosk, and, therefore, the jury's guilty verdict on the burglary count must be reversed. He acknowledges a conviction may be based solely on circumstantial evidence and that the corroborating evidence to support a burglary conviction need only be slight. (*People v. Mendoza* (2000) 24 Cal.4th 130, 176 (*Mendoza*), superseded by statute on another ground, as stated in *People v. Brooks* (2017) 3 Cal.5th 1, 63 & fn. 8.) He nonetheless relies on the principle that "'[possession] alone of property stolen in a burglary is not of itself sufficient to sustain the possessor's conviction of that burglary. There must be corroborating evidence of acts, conduct, or declarations of the accused tending to show his guilt.'" This argument is correct as far as it goes. (*In re D.M.G.* (1981) 120 Cal.App.3d 218, 227.) But corroborating evidence includes the time, place, and manner of the defendant's possession of stolen property, the defendant's conduct, and any other evidence that tends to connect the defendant with the crime. (*People v. Parson* (2008) 44 Cal.4th 332, 355.)

Gonzalez emphasizes the fact that, unlike the defendant in *Mendoza*, he made no admission concerning the burglary. (*Mendoza*, supra, 24 Cal.4th at p. 176.) He also distinguishes *People v. McFarland* (1962) 58 Cal.2d 748 (*McFarland*) because he

gave no "false explanation" of his possession of stolen property. (*Id.* at p. 754.) But as *McFarland* teaches, corroboration in the form of an admission or an incriminating statement is not required. Corroboration may come in the form of other evidence. "Possession of recently stolen property is so incriminating that to warrant conviction there need only be, in addition to possession, slight corroboration in the form of statements *or conduct* of the defendant tending to show his guilt." (*Ibid.*, italics added.)

Here, Gonzalez robbed Tosha of her phone, and the discovery of her phone case near the bicycle kiosk physically connected him to the burglary. The arresting officers apprehended defendant with a bicycle missing from the rental kiosk in close proximity to the kiosk (100 to 200 yards away) within minutes of it being taken. The jury reasonably could infer defendant dropped Tosha's phone case at the kiosk as he stole the bicycle. We must view the record in the light most favorable to the verdict and not, as Gonzalez would have it, in the light most favorable to him. There is no merit in his substantial evidence challenge.

C. *Gang Enhancement*

Gonzalez challenges the sufficiency of the evidence to support the gang enhancement, which the jury found true on all counts as alleged, including counts 1 and 2 for robbery, count 6 for illegal possession of a firearm by a felon, counts 9 and 10 for aggravated kidnapping, and count 11 for dissuading a witness. Defendant contends the "only" reason the jury concluded these crimes were gang-related was because the prosecutor presented evidence he was a gang member. He correctly adds a person's gang affiliation alone is insufficient to support the gang enhancement. (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199 (*Frank S.*).) "[T]he record must provide some evidentiary support, other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for a finding that the *crime* was committed for the benefit of, at the direction of, or in association with a criminal street gang." (*People v.*

Martinez (2004) 116 Cal.App.4th 753, 762.) Once again, we disagree with defendant's conclusion that the evidence on this issue is insufficient.

For purposes of our review, the evidence is sufficient if the jury reasonably could find that Gonzalez committed the offenses in association with his fellow gang members Baiza and Lopez. In that regard, he had previously committed other gang related offenses with each of them; they drove with him to the scene knowing he was armed because he openly cleaned his gun in their presence; and the jury could infer from their departure in the Jeep soon after defendant was apprehended that they had been his lookouts or otherwise stood ready to drive him away after his crime spree.

And even if neither Baiza nor Lopez physically participated in actually committing the offenses—for example by acting as a lookout—the jury could infer their presence and defendant's commission of the crimes benefited their gang. The prosecution's gang expert said as much when he explained that important roles for gang members to play in the gang subculture, including the 17th Street gang, were to provide "backup" for each other and to validate to others in the gang that a crime was committed. The validation role stems from the perverse value assigned to violence in the gang subculture, where the more violent the crime a gang member commits, the more respect he gains for himself within and for his gang. By committing violent acts and instilling fear in the local community, the gang member elevates both his and his gang's status.

Gonzalez correctly observes that just as gang affiliation alone is not enough to support a conviction, neither is unsupported expert testimony asserting an offense is gang-related. (See, e.g., *People v. Ferraez* (2003) 112 Cal.App.4th 925, 931.) The trial court, however, did not permit the gang expert to offer any opinion as to whether defendant's offenses were gang-related; the court also precluded the expert from offering any conclusion based on a hypothetical closely mirroring the facts of the case. Instead, the court left the issue to the jury to draw its own conclusion. The jury, having learned of the importance of violence to gangs and of validation of violent gang crimes, reasonably

could conclude from Baiza's and Lopez's presence at or near the scene that the offenses were gang-related. And it did. The jury could conclude Baiza and Lopez's immediate departure when Gonzalez was arrested was no coincidence. Instead, they had been there ready to "back up" and validate defendant's commission of the crimes.

The jury's conclusion the enhancement applied is also supported by the fact that Gonzalez was not a newcomer to the gang, unlike the minor in *Frank S.*, who was a gang "affiliate" rather than a full-fledged member. (*Frank S.*, *supra*, 141 Cal.App.4th at p. 1199.) The evidence here suggested Gonzalez was an active gang member steeped in his gang culture. Multiple officers testified to their frequent field contacts with Gonzalez in which he admitted he was a 17th Street gang member, exhibited the gang's tattoos on his face and arms, knew the gang's colors and symbols, and committed crimes with fellow members. In 2009, within two weeks of joining the gang, Gonzalez had served as Baiza's lookout in committing a vandalism offense. By 2011, he had graduated to a residential burglary, at which officers apprehended him at the scene with both Baiza and Lopez. On seeing each other at the jail after Gonzalez committed the current offenses, Lopez addressed him by his gang moniker and Gonzalez remarked that they were "go[ing] through this shit again."

In sum, Gonzalez's association with Baiza and Lopez, past and present, supported the jury's true finding on the gang enhancement. Associating with other gang members while committing an offense serves as a valid basis for the gang enhancement. (*People v. Albillar* (2010) 51 Cal.4th 47, 62 (*Albillar*).) As the expert in *Albillar* explained, having fellow members nearby when committing violent acts serves a gang purpose because '"[g]ang members do not increase their status or reputation by going out . . . and committing crimes by themselves . . . with absolutely no proof of its occurrence."' (*Id.* at p. 61.)

Gonzalez's reliance on *Frank S.* and *People v. Ochoa* (2009) 179 Cal.App.4th 650 is misplaced because in those cases the defendant, although likely a gang member, essentially acted alone, without the encouragement or support of any fellow gang members.

Gonzalez's reliance on *People v. Ramon* (2009) 175 Cal.App.4th 843 (*Ramon*) is also unavailing. There the court found the evidence insufficient to support the enhancement even though the defendant was found in possession of a stolen vehicle in which a fellow gang member was a passenger. (*Id.* at p. 853.) We believe *Ramon* has been fairly criticized for ignoring the association prong of the gang allegation. (*People v. Ochoa, supra*, 179 Cal.App.4th at p. 661, fn. 7.) Moreover, *Ramon* acknowledged that where the charged offense is one of the gang's primary activities, such evidence may establish the crime is gang-related for purposes of the enhancement. (*Ramon*, at p. 853.) Here, the fact that illegal firearm possession was one of the 17th Street gang's primary activities lends support to the jury's conclusion the enhancement applied to that offense and to the other offenses, all of which he used the gun to commit.

Gonzalez argues the jury could not reasonably find he committed the crimes for a gang-related purpose because he committed them in Huntington Beach rather than near the 17th Street gang's base in Garden Grove. He observes that he made no gang signs or gang-related statements. He notes the gang expert acknowledged that a perpetrator's apologies during an offense are uncharacteristic of a gang offense. These matters, however, raised questions of fact. As such, they were for the jury's consideration, not ours.

The expert testified, and the jury could reasonably find, that insincere apologies may constitute a ploy to get victims to acquiesce to a robbery or kidnapping. The evidence does not mandate the conclusion drawn by Gonzalez; namely that he would necessarily disclose the apology to Baiza and Lopez which would prevent them from thereafter spreading word of the crimes for his and his gang's benefit. Indeed, at the jail,

Gonzalez told the booking officer that he had "aggressively" confronted "that black bitch," not that he had apologized to her as he took her property. Similarly, the jury could find it immaterial that Gonzalez did not state his gang's name or flash gang signs when there was no evidence he tried to hide his obvious facial tattoo or the fact he was dressed all in black, a color he admitted he knew signified his gang. The expert also explained that offenses committed outside a gang's territory may nonetheless benefit the gang by adding to its violent reputation. The jury reasonably could find that brazen, violent offenses committed in a popular, public beachfront area would enhance that reputation. Substantial evidence supports the gang enhancement.

2. *Jury Question Regarding Gang Association*

On its second day of deliberations, the jury sent the trial court three requests including, "We would like to know the definition [of] The Association of a Gang." The jury also asked for a read back of an officer's testimony concerning STEP advisements[3] and "[i]f possible," a copy of the advisement. The court's minutes reflect that the reporter provided the requested read back. A notation ("No") on the jury's question suggests the court was unable to provide a copy of the STEP notice. The court conferred with the parties in chambers regarding the jury's gang association question without the reporter present, and then referred the jury to CALCRIM Nos. 200, 1400, and 1401.

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[3] A STEP notice is a form that police officers may give in field contacts "to individuals associating with known gang members." (*People v. Sanchez* (2016) 63 Cal.4th 665, 672.) The advisement "informs the recipient that he is associating with a known gang; that the gang engages in criminal activity; and that, if the recipient commits certain crimes with gang members, he may face increased penalties for his conduct." (*Ibid.*) The STEP acronym derives from the California Street Terrorism Enforcement and Prevention Act that created the substantive gang crime defined in section 186.22, subdivision (a), and the gang enhancement defined in subdivision (b). (*Sanchez*, at p. 672, fn. 3.)

CALCRIM No. 200 instructs the jury that "[w]ords and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings."

CALCRIM No. 1400 defines a criminal street gang, as pertinent to this case, as "any ongoing organization, *association*, or group of three or more persons, whether formal or informal," having the following three characteristics: (1) a common name or identifying sign or symbol; (2) commission of felony vandalism or illegal possession of firearms as one or more of its primary activities; and (3) whose members acting alone or together engage in or have engaged in a pattern of criminal gang activity. (Italics added.)

CALCRIM No. 1401 instructed the jury that in order to find the alleged gang enhancement true for the alleged counts the prosecution must prove "that the defendant committed that crime for the benefit of, at the direction of, or *in association with* a criminal street gang." (Italics added.) During closing argument, the prosecutor had stated that the phrase "in association with" meant committing a crime with other gang members, while defense counsel emphasized the jury should consider whether, on the evidence presented, "anybody else participated in" the crimes defendant allegedly committed.

Gonzalez contends the trial court's answer to the jury's request for a definition of "[a]ssociation of a [g]ang" violated his "due process rights to a jury adequately instructed in the law and to a true finding" on the gang enhancement. Specifically, he asserts the court erred in answering "the jury's question by referring it to irrelevant instructions and to the gang enhancement instruction that the jury did not understand."

The Attorney General argues Gonzalez forfeited his appellate challenge by failing to object to the trial court's response to the jury's question. We will review his claim because the court must answer the jury's "desire to be informed on any point of law

arising in the case" (§ 1138), and a defendant is entitled to appellate review of trial court instructions affecting his or her "substantial rights" even in the absence of an objection below (§ 1259).

Gonzalez's claim has no merit. Although section 1138 imposes a mandatory duty on the court to provide the jury with requested information on points of law, that "'does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information.'" (*People v. Eid* (2010) 187 Cal.App.4th 859, 882.) Referring the jury back to the original instructions can be an appropriate response when those instructions are accurate. (*People v. Harris* (2008) 43 Cal.4th 1269, 1317.) We review for an abuse of discretion claims of instructional error under section 1138. (*Eid*, at p. 882.)

The trial court did not abuse its discretion here because the instructions to which it referred the jury were correct statements of law and answered the jury's query. Specifically, CALCRIM No. 200 told the jury that the words in its query concerning gang association were "to be applied using their ordinary, everyday meanings." The court also properly referenced CALCRIM Nos. 1400 and 1401 because those instructions related directly to the gang association terminology.

Gonzalez invokes the high court's statement in *Bollenbach v. United States* (1946) 326 U.S. 607, 612-613, that "[w]hen a jury makes explicit its difficulties, a trial judge should clear them away with concrete accuracy." In *Bollenbach*, however, the trial court answered the jury's question with an instruction that was "simply wrong." (*Id.* at p. 613.) Here, on the other hand, the court's response correctly specified the context (CALCRIM Nos. 1400, 1401) in which the jury was to evaluate the requisite gang "[a]ssociation" and gave the jury the tools to make that evaluation by reminding them to use the ordinary meaning of the word.

Gonzalez argues that referring the jury to the initial instructions that had left the jury seeking clarification was not sufficient, but nothing suggests this jury remained confused after the court gave its answer. Once redirected to CALCRIM Nos. 200, 1400, and 1401, the jury reached its verdict within 90 minutes, a period which appears to have included the time required for the read back of testimony. Even conscientious, intelligent jurors may need to be reminded of information already contained in the instructions. We presume jurors "are intelligent persons capable of understanding and correlating jury instructions" (*People v. Martin* (1983) 150 Cal.App.3d 148, 158). Reinstruction does not undermine that principle. Consequently, the court did not err in responding to the jury's query as it did.

3. *Sentencing Issues—No Remand Necessary*

A. *Section 654*

Gonzalez contends the trial court erred by imposing concurrent terms on his robbery convictions in counts 1 and 2, rather than staying any sentence on those counts under section 654 based on his conviction in counts 9 and 10 for aggravated kidnapping. The jury's verdict forms reflected that counts 1 and 2 were based on the robbery "at the firepit," while the verdict forms identified counts 9 and 10 as "Kidnap[ping] to Commit Robbery" when Gonzalez moved the victims "from the firepit to the car."

Section 654 may preclude multiple punishment not only for a single act, but also for an indivisible course of conduct motivated by a single intent or objective. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1209 (*Latimer*); *Neal v. State of California* (1960) 55 Cal.2d 11, 19.) Gonzalez argues the trial court was required to conclude he entertained only a single intent and objective—to rob Tosha and her date of their personal property. He asserts, therefore, the robberies he committed at the fire pit and at the car could only be viewed as one indivisible course of conduct. We disagree.

"The initial inquiry in any section 654 application is to ascertain the defendant's objective and intent. If he entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*People v. Beamon* (1973) 8 Cal.3d 625, 639 (*Beamon*).)

Gonzalez relies on *Beamon* and similar cases holding that section 654 bars separate punishment for "kidnaping for the purpose of robbery and for the commission of that very robbery." (*Beamon*, *supra*, 8 Cal.3d at p. 639; see also, e.g., *People v. Lewis* (2008) 43 Cal.4th 415, 519.) He also relies on *People v. Bauer* (1969) 1 Cal.3d 368 (*Bauer*) and another case in which the evidence showed "a course of conduct comprising an indivisible transaction" that precluded multiple punishment under section 654 when, after robbing victims of their property at one location, the defendant also took a victim's car from the same location. (*Bauer*, at p. 377; see *People v. Ortega* (1998) 19 Cal.4th 686, 689 [same].)

These cases are inapt. Other cases involving robbery at one location and kidnapping for the purpose of a second robbery at another location illustrate the point. In *People v. Porter* (1987) 194 Cal.App.3d 34 (*Porter*), the defendant robbed the victim of money and his wallet at his car, then forced him to drive two or three blocks to an ATM, where the defendant failed to make a withdrawal with the victim's credit card. (*Id*. at pp. 36-37.) In *People v. Smith* (1992) 18 Cal.App.4th 1192 (*Smith*), the defendant robbed the victim of cash, two videocassette recorders, and a stereo receiver in his apartment, and then drove the victim several blocks to a bank where he withdrew funds with the victim's ATM card. (*Id*. at pp. 1194-1195.)

In both cases, the reviewing courts held that section 654 did not preclude separate punishment for robbery and kidnapping for the purpose of robbery. The *Porter* court, distinguishing *Beamon*, held that "the record suggests that appellant was convicted

of the robbery of the victim's wallet and of kidnapping for the purpose of a different robbery involving the compelled withdrawal of funds from an automated teller, which was unsuccessful. This is not, therefore, a case of punishing appellant for kidnapping for the purpose of robbery and for committing 'that very robbery.'" (*Porter*, *supra*, 194 Cal.App.3d at p. 38.) The *Smith* court, noting that "[d]uring the five years since it was decided, the reasoning of *Porter* has not been questioned," affirmed separate punishment for the robbery at the apartment and the kidnapping for the purpose of robbery at the ATM. (*Smith*, *supra*, 18 Cal.App.4th at p. 1199.)

Porter and *Smith* both distinguished *Bauer* because the facts in each did not involve, as in *Bauer*, merely taking several items during the course of the same robbery, including taking the victim's vehicle at the end of the robbery. (*Porter*, *supra*, 194 Cal.App.3d at p. 38; *Smith, supra,* 18 Cal.App.4th at pp. 1198-1199.) The Supreme Court initially granted and then dismissed review in *Smith*, directing that the opinion be republished. (*Smith, supra,* 18 Cal.App.4th 1192, review granted Sept. 17, 1992, S027733, and review dismissed Nov. 10, 1993.) Almost contemporaneously the Supreme Court cited *Porter* favorably for the proposition that "kidnapping the same victim for a later, additional, robbery" does not qualify for a stay under section 654. (*Latimer*, *supra*, 5 Cal.4th at p. 1212.)

We must uphold the court's sentencing decision in the face of a section 654 challenge when, as here, it is supported by substantial evidence. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) The facts here are analogous to *Porter* and *Smith* in that the trial court reasonably could conclude defendant's two separate acts of robbery in different locations fell outside section 654. The evidence supports the conclusion Gonzalez did not intend to commit the kidnapping offense when he first confronted his victims at the fire pit, but instead he formed a new, distinct intent to commit a different robbery by moving the victims to a separate location after Tosha volunteered she had cash at her vehicle.

Even assuming Gonzalez harbored a singular intent to obtain property, a course of conduct with a uniform intent and objective may give rise to multiple violations and punishment if the conduct is divisible in time. (*Beamon*, *supra*, 8 Cal.3d at p. 639, fn. 11; *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1253-1254.) Punishment for two offenses may be imposed where a defendant has the opportunity to reflect and terminate his illegal behavior but chooses to proceed, "thereby aggravating the violation of public security or policy already undertaken." (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.) The distinct times and places in which Gonzalez committed his two robberies supports the trial court's decision to impose punishment for both robbery and kidnapping for robbery. There was no section 654 error.

B. *No Gang Enhancement Imposed on Count 7*

Gonzalez retracts in his reply brief the assertion he made in his opening brief that the trial court erred by imposing a three-year gang enhancement that was neither pleaded nor proven on his burglary conviction in count 7. As the Attorney General points out, and defendant concedes, after the court initially imposed the enhancement on count 7, it immediately recognized "[o]n count 7 there is no enhancement whatsoever" and resentenced defendant without it. Consequently, there was no error.

4. *Sentencing Issues for Consideration in the Trial Court's Discretion on Remand*

A. *Section 12022.53 Firearm Enhancements*

The Attorney General concedes, and we agree, remand and resentencing is required to allow the trial court to consider whether to impose or strike the 10-year personal use of a firearm enhancement (§ 12022.53, subd. (b)) attached to the lead count for sentencing, count 9 (aggravated kidnapping), and imposed concurrently on the robbery convictions in counts 1 and 2 and on the kidnapping conviction in count 10.

At the time of sentencing in July 2017, firearm enhancements under section 12022.53 were mandatory and could not be stricken in the interests of justice. (See former § 12022.53, subd. (h); *People v. Felix* (2003) 108 Cal.App.4th 994, 999.) On October 11, 2017, the Governor signed Senate Bill No. 620 (2017-2018 Reg. Sess.), which amended section 12022.53, effective January 1, 2018. Under the amendment, a trial court now has discretion to strike or dismiss a firearm enhancement. Amended section 12022.53, subdivision (h), now provides: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section."

The change applies retroactively to Gonzalez and other defendants whose sentences were not final before the amendment took effect. (E.g., *People v. Zamora* (2019) 35 Cal.App.5th 200, 203; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1091.) In such instances, the Legislature effectively "has determined that the former penalty provisions may have been too severe in some cases and that the sentencing judge should be given wider latitude in tailoring the sentence to fit the particular circumstances." (*People v. Francis* (1969) 71 Cal.2d 66, 76, accord, *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 308.) Accordingly, on remand, the trial court will have discretion to consider whether to strike or impose the firearm enhancements.

The trial court's authority to exercise its sentencing discretion regarding the firearm enhancements introduces a change in sentencing circumstances under which the court may—if it so chooses—resentence a defendant "as to all counts" to achieve the sentence the court deems appropriate. (*People v. Navarro* (2007) 40 Cal.4th 668, 681 (*Navarro*).) In considering resentencing choices, the court is subject only to the limitation not to impose a greater aggregate term on remand. Thus, the court may adjust its selection of a lower, upper, or midterm sentence if it strikes or dismisses the firearm use allegation. (See *People v. Castaneda* (1999) 75 Cal.App.4th 611, 613-615.) We leave these issues to the trial court's sound discretion.

B. *Sentence Must Be Imposed on Counts 5 and 8*

As Gonzalez observes, and the Attorney General acknowledges, the trial court omitted imposing a sentence on count 5 for the active gang participation offense and on count 8 for misdemeanor receiving stolen property. Instead, the court preemptively stayed under section 654 execution of sentence on those counts. Sentencing must precede a stay under section 654. (*People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1327.) On remand, the court shall impose sentence on counts 5 and 8.

C. *Romero Motion*

Gonzalez contends the trial court's misunderstanding of the facts of the case caused it to deny his oral motion at sentencing to strike his prior residential burglary strike under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). Specifically, in denying the motion, the court observed that when Gonzalez approached Tosha and her date, he "put a gun in their face" and, "[f]rom that point forward, when he began to ask for things from them, until he walked them . . . to their car, . . . [he kept] the gun pointed at them the entirety of the crime."

Gonzalez argues that Tosha testified that he drew the gun at the fire pit, but held it with the barrel pointed down. He further asserts Tosha testified she could not see the gun and did not feel it in her back as they walked to the car.

Gonzalez acknowledges the trial court heard the evidence at trial, but suggests any misapprehension at sentencing was due to the probation report's allegedly mistaken account which summarizes that defendant "pointed the handgun at them" and "followed behind them still holding the revolver." The latter description is consistent with the evidence at trial in which Tosha testified that Gonzalez warned that if she or her date tried anything "funny," he would kill them, strongly implying he still held the gun. In any event, we are inclined to agree with the Attorney General's interpretation of the

trial court's comments about pointing the gun "at" his victims and holding it "in their face" as colloquial references to being robbed at gunpoint, which the court described as "a very serious and scary event for those victims."

Nevertheless, in light of the necessity of remand for resentencing on the firearm enhancements, there is no need for any doubt to linger. The trial court on remand for resentencing has full authority to consider and modify "every aspect of the defendant's sentence" (*People v. Burbine*, *supra*, 106 Cal.App.4th at p. 1259) in order to achieve the court's sentencing objectives, including to resentence defendant "as to all counts" (*Navarro*, *supra*, 40 Cal.4th at p. 681) or none (*Peracchi*, *supra*, 30 Cal.4th at p. 1255). As discussed, the trial court's only limitation is that it cannot increase the defendant's sentence.

The Attorney General suggests Gonzalez forfeited the opportunity to challenge an alleged error in the probation report's account of events by failing to object below. But, as defendant observes, the probation report is largely irrelevant because this is a matter committed to the trial court's sound discretion and understanding of the case.

D. *Section 667 Prior Serious Felony Enhancement*

The trial court also now has discretion to determine whether or not to reimpose the formerly mandatory five-year prior serious felony enhancement under section 667, subdivision (a) [hereafter section 667(a)]. Senate Bill 1393 (2017-2018 Reg. Sess.) (Stats. 2018, ch. 1013), signed by the Governor in September 2018 and effective on January 1, 2019, amends sections 667(a) and 1385, subdivision (b), to authorize trial courts to exercise their discretion to consider whether to strike or dismiss section 667(a)'s five-year prior serious felony recidivism enhancement. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) The parties agree the change is retroactive to cases like Gonzalez's that are not yet final on appeal as of the amendment's effective date. (*Id.* at pp. 972-973.)

The Attorney General nonetheless argues remand is unnecessary because the trial court's comments suggest it would not have struck or dismissed the enhancement if it had authority to do so when it originally sentenced Gonzalez. The Attorney General relies on the court's view that "[t]he Three Strikes law was really designed, quite frankly, to stop people from committing violent crimes with guns" and that "pointing a gun at someone throughout [an offense] is exactly the case they wanted to have stopped . . . ." The Attorney General relies by analogy on authority holding resentencing is not required despite the enactment of Senate Bill 620 (2017-2018 Reg. Sess.) (Stats. 2017, ch. 682) concerning firearm enhancements when "the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement." (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.)

We are not persuaded. It remains within the trial court's discretion to craft the sentence it deems appropriate, including by balancing defendant's recidivism and use of a firearm with other factors, based upon the court's overall assessment of the facts. Gonzalez argues that even if the court on remand concludes "his crime fit squarely within the spirit of the Three Strikes law based on his criminal history," and therefore rejects his *Romero* motion as to his prior strike conviction, "it might conclude . . . punishment under the Three Strikes law suffice[s]," and therefore decline to impose section 667(a)'s additional—but now discretionary—five-year enhancement. Gonzalez argues the court reasonably could do so "based on factors such as [his] youth—he was only 20 years old when he committed the current offense and 17 when he committed the prior burglary—or based on a true perception of the nature of the offense," which defendant maintains "was less egregious than [the court] believed at sentencing." As noted, these considerations rest within the trial court's sound discretion on remand. We express no opinion as to how the trial court should exercise its discretion on these matters.

E. *Modification of the Court's Minutes and Abstract of Judgment*

The trial court's minutes must be corrected, as the parties agree, to reflect the fact that Gonzalez was found guilty of counts 2 (robbery) and 11 (witness dissuasion) by the jury in its verdict, and not as a result of a guilty plea.

Gonzalez also suggests the trial court should amend the abstract of judgment to reflect the indeterminate concurrent life sentences the court imposed on counts 10 and 11, specifically 30 and 14 years to life, respectively. The Attorney General notes there is no section specified on the Judicial Council's Form CR-292 (Rev. 2012) for recording indeterminate terms imposed as concurrent sentences, while Gonzalez suggests the indeterminate length could be listed in sections 6(c) or 6(d) on the form. As Gonzalez cites no authority for his position, we again leave the matter to the trial court's sound discretion whether to add the indeterminate sentence length for concurrent counts 10 and 11 when the court resentences defendant on remand.

DISPOSITION

We affirm all convictions suffered by defendant. We reverse the judgment for resentencing only on the issues discussed. On remand, at a new sentencing hearing, the trial court shall have the opportunity to exercise its new statutory authority to consider whether on the applicable counts to strike or dismiss the firearm enhancement under section 12022.53, subdivision (b); and also the five-year prior serious felony enhancement under section 667, subdivision (a). The court also shall impose sentence on count 5 (active gang participation) and count 8 (receiving stolen property). The court in its discretion may clarify its remarks on Gonzalez's *Romero* motion. It remains within the court's sound discretion on remand whether to modify any aspect of Gonzalez's sentence on any count or enhancement in order to achieve the court's sentencing objectives. The court may not increase defendant's sentence.

The court shall correct its minutes to reflect the fact that Gonzalez was found guilty of count 2 (robbery) and count 11 (witness dissuasion) by the jury in its verdict, rather than as a result of a guilty plea. If the court reimposes concurrent indeterminate life terms on counts 10 and 11, it may in its discretion list the minimum length of those terms on the abstract of judgment. On resentencing, the court shall prepare a new abstract of judgment and forward it to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

GOETHALS, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.